the perceived creditworthiness of cable systems as opposed to wireless cable systems or other distribution means. Thus, we emphasize that our rules will not permit vendors to make creditworthiness decisions based only on the distribution technology involved. We believe our regulations correctly balance the rights of vendors and distributors while fulfilling Congressional intent.

**110.** The statute also directs that our regulations should allow price differentials based on differences in "offering of service". Neither the statute nor its legislative history provides much guidance on the proper definition of this term, although we believe that it refers to differences related to the actual service exchanged between the vendor and the distributor. For example, such considerations could be manifested in standard contract terms based on a distributor's willingness to provide secondary services that are reflected as a discount or surcharge in the programming service's price. Although some MVPDs such as NRTC maintain that all distributors fall into one class, we agree with commenters claiming that the flexibility from "offering of service" discounts ultimately facilitates greater availability of programming. We also recognize United Video's argument that with respect to service to the HSD market, certain distributors may have capabilities to function like other (cable) distributors, yet many of these functions duplicate aspects of a vendor's service and are not necessarily used in the programming transmission. As a result, these duplicative capabilities should not immediately lead to establishing a single class of distributors. We also believe that even if we assume a single class of distributors, the record clearly demonstrates that each distributor will seek to distinguish itself within a medium by its willingness to accept certain terms, or to provide secondary functions in return for a lower price.

**111.** Consequently, we adopt regulations that will allow programming vendors to establish price differentials based on factors related to offering of service. Such factors could include, for example, penetration of programming to subscribers or to particular systems;[187] retail price of programming to the consumer for pay services;[188] amount and type of promotional or advertising services provided by a distributor; a distributor's purchase of programming in a package or a la carte; channel position; importance of location for non-volume reasons;[189] prepayment discounts; contract duration; date of purchase,

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[187] For instance, a vendor may justify a price differential for an MSO that purchases a programming service for all its cable systems, rather than only selected markets. Likewise, for pay or premium services, a vendor may offer incentive discounts to encourage distributors to offer the programming service to a larger percentage of the distributor's total subscribers.

[188] As an example, a vendor may offer discounts to distributors as an incentive for lower retail prices for subscribers, especially in the case of premium services that are sold a la carte.

[189] We note that a vendor may offer discounts to secure contracts for a programming service in key markets, such as Manhattan or Los Angeles, for purposes of enhancing advertising or program production. Such discounts could appropriately apply, then, for all competitors in those markets.

especially purchase of service at launch;[190] and other legitimate factors as standardly applied in a technology neutral fashion.[191] We emphasize that this list of considerations is intended to provide examples of frequently used contractual terms, and is not exclusive; vendors may use other standardly applied "offering of service " discounts (or surcharges), to the extent that they are willing to justify such terms, as necessary on a case-by-case basis.[192]

**112.** Use of "rate cards". Given that our definition of "discrimination" by a vendor initially requires a price differential as compared among competing distributors, we must establish a common basis for such price comparisons and determine how to make such information generally accessible to potential complainants. We believe accurate comparisons could occur by using a vendor's "rate card," standard contracts, or other generally accepted pricing information regarding a vendor's programming service. The record in this proceeding, however, has established that vendors currently employ a variety of sales practices, and that individual vendors require considerable flexibility in establishing a mutually acceptable price in order to facilitate the continued sale of multichannel video programming under dynamic market conditions. Therefore, we will permit vendors to choose whether to use a "rate card" as well as the format and relevant pricing factors, without requiring a filing with the Commission, with the proviso that such pricing information will play an integral role in a vendor's ability to justify rate differences between competing distributors.[193] Also, we realize that distributors as potential complainants may not always have access to a vendor's pricing information. Accordingly, under the complaint process described below,

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[190] For example, a vendor could conceivably justify rate differences, or a separate rate structure, to distinguish those distributors that were "charter members" or longstanding customers of a service, provided that such discounts are or were available to distributors of any technology. Any such potential rates, however, must result from specific provisions of a contract that predates the complainant's attempt to purchase the same programming.

[191] Certain commenters have argued in favor of the merits of price differentials based upon a vendor's attempt to "meet competition" at the price level for another vendor's service. We recognize that such practices may benefit the public in certain instances by increasing the availability of programming and reducing the price of programming to consumers, and we will determine whether these benefits are likely to occur on a case-by-case basis.

[192] Vendors responding to complaints may attempt to justify practices causing a price differential under more than one statutory factor when necessary, particularly when the appropriate category is uncertain based on our rules or Commission precedent.

[193] Given the complexity created by the different uses of rate cards and other pricing techniques by programming vendors, we strongly encourage vendors to specify the factors in their contractual arrangements that affect price, and to use those contracts in resolving disputes rather than relying on the basic information on a rate card.

potential complainants may make a certified request of information from vendors; if the request is denied or insufficient information is provided for a comparison, we will allow a distributor to file a complaint without such information. Under this framework, vendors may determine their own sales practices in order to accommodate the desired level of flexibility, thus assuming their own degree of risk in proving the legitimacy of their pricing differentials. We believe that this approach will facilitate the process of resolving disputes by creating an incentive for vendors to use standard sales techniques and to make pricing information available as necessary to distributors, while simultaneously preserving a degree of flexibility for each vendor's sales preferences that might result from the unique nature of each programming service.

**113.** With respect to recommendations by certain commenters that we require filing of "rate cards", contracts, or other types of pricing information, we conclude that requiring vendors to file pricing materials would impose a major administrative burden on Commission resources, and could create additional problems related to the confidentiality of such information. Further, to the extent that parties have shown that standard "rate cards" generally do not exist, we believe that a filing requirement would impose an excessive constraint on vendors -- thus increasing the possibility of limiting the sale of programming -- and could diminish competitive pricing for multichannel programming through a standardization of higher programming rates as vendors become more aware of the pricing practices by competitors.

**114.** Buying groups. We agree with commenters that buying groups or purchasing agents can offer some economies of scale or other efficiencies to programming vendors which would justify price discounts under the statute. However, we also agree that in order to benefit from treatment as a single entity for purposes of subscriber volume, a buying group should offer vendors similar advantages or benefits as a single purchaser, including for example, some assurance of satisfactory financial and technical performance. We do not believe that it is necessary to impose size or ownership restrictions.[194] Vendors can extend the same volume discounts based on number of subscribers that they would ordinarily extend to single entities of comparable size provided that such discounts are offered in a nondiscriminatory fashion. Likewise, a strict requirement of joint marketing strategies would not appear to be feasible for a group with national membership. Marketing plans could vary significantly depending on geographic location and would appear to be more appropriately tailored to individual distributors in specific local markets. We would encourage buying groups, however, to cooperate with programming vendors on marketing strategies that would best represent the interests of their members and that would provide the economic benefits of a larger number

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[194] See, e.g., United Video at 28, suggesting that groups should be limited to situations where a single entity owns at least 51% of each member of the group. Cf. Liberty Media at 41, which states that it does not appear necessary now to limit the size of individual entities participating in buying groups provided that the total number of subscribers does not exceed whatever horizontal concentration limits are established by the Commission pursuant to Section 11 of the Act.

of subscribers.

**115.** Accordingly, the regulations we adopt include requirements that a buying group seeking unitary treatment from a programming vendor must agree to be financially responsible for any fees due under a contract to which it is a party.[195] Alternatively, if individual members are contracting parties, they must agree to joint and several liability for commitments of the group. In addition, group members must agree to uniform billing and standardized contract provisions. With respect to technical performance, a vendor offering unitary treatment to a purchasing group has the right to require members to agree to certain reasonable technical standards which will be guaranteed by the group entity or its individual members. A programming vendor can, of course, legitimately apply any of the statutorily permissible justification factors such as creditworthiness to buying groups in the same manner as they would be applied to individual MVPDs on a nondiscriminatory basis. These regulations appropriately balance the interests of programming vendors in receiving prompt payment and adequate technical quality for their services and those of MVPD members of buying groups in receiving any available benefits from large subscriber numbers.

### D. Non-price Discrimination

**116.** We believe that non-price "discrimination" by a programming vendor between competing distributors is also covered within Section 628(c). While specific practices within this prohibition are not well identified or discussed by commenters, we believe that one form of non-price discrimination could occur through a vendor's "unreasonable refusal to sell", including refusing to sell programming to a class of distributors, or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor's competitor. We believe that the Commission should distinguish "unreasonable" refusals to sell from certain legitimate reasons that could prevent a contract between a vendor and a particular distributor, including (i) the possibility of parties reaching an impasse on particular terms, (ii) the distributor's history of defaulting on other programming contracts, or (iii) the vendor's preference not to sell a program package in a particular area for reasons unrelated to an existing exclusive arrangement or a specific distributor.[196] Our implementation of the non-price discrimination aspects of

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[195] We note that we have extended the general requirement for unitary treatment of a buying group's members to apply in the context of our definition of geographic relevant markets, which will guide comparisons of "competing" distributors, supra. As a result, our rules for identifying "competing" distributors will treat a particular buying group as a single local, regional, or national distributor depending upon the fundamental nature of its operation.

[196] We believe that this interpretation is consistent with the specific language of Section 628. In particular, we note that Section 628(c)(3)(A) provides "Nothing in this section shall require any person who is engaged in the national or regional distribution of video programming to make such programming available in any geographic area beyond which such programming has been authorized or licensed for distribution."

Section 628(c) concerning unreasonable refusals to sell or similar exclusionary practices will draw upon certain antitrust precedents to define "unreasonable", as well as other legal principles, and will be addressed individually through the enforcement process.[197] In addition, we believe that Section 628(c)'s prohibition against non-price discrimination would also encompass situations in which a vendor refuses to offer particular terms to an individual distributor, or class of distributors, that are offered to competing distributors. This would prohibit such practices, for example, as selling programming to one distributor on an a la carte basis, but refusing to permit that distributor's competitors to purchase the same programming on the same terms or conditions.

### E. Application of Rules to Existing Contracts

**117.** In the Notice, we observed that the statute is silent concerning enforcement of anti-discrimination rules with respect to existing contracts, and tentatively concluded that we could not apply the new rules retroactively against existing contracts.[198] We sought comment on this analysis and requested that commenters "address the extent that the Commission should implement Section 628 with respect to existing contracts."[199] We noted that if we waited for existing contracts to expire, "we may not achieve the results Congress envisioned from the requirements of Section 628 in a timely fashion given the long term nature of many programming agreements."[200] Accordingly, we requested that commenters address whether we should establish a deadline (and address what an appropriate deadline should be) for compliance that would afford parties sufficient time to renegotiate contracts. In this regard, we also sought information as to the current duration of existing contracts. We further sought comment on whether renewals of existing contracts subsequent to the adoption of the Notice should comply with the new rules. Finally, we asked commenters to address whether parties could base discrimination claims on contracts that predate the new rules.

**118.** Commenters opposing application of the regulations developed under Section 628 to existing contracts argue that such application would constitute illegal retroactive rulemaking.[201] They rely on Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988), and other cases, arguing that the Commission may not apply the anti-discrimination rules to existing contracts because there is no clear congressional intent to do so.[202] Should the Commission conclude, however, that it has authority to apply Section 628 to existing contracts, programmers argue that compulsory abrogation of existing

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197 See discussion of enforcement process for discrimination, infra.

198 Notice at 201.

199 Id.

200 Id.

201 See, e.g., Rainbow at 17-18.

202 See, e.g., Superstar at 62-64.

agreements would reduce their income and unreasonably disrupt their ability to secure costly programming, and would harm them financially.[203] In addition, the programmers contend that renegotiation of these contracts would pose a difficult and burdensome task, forcing costs to be passed on to consumers.[204] These commenters generally seek a grace period of several years to bring their existing agreements into compliance with our program access rules.[205] Finally, a number of commenters contend that a complainant should not be allowed to use a contract entered into before the Act or the effective date of the rules as a basis for comparison to determine whether a contract entered into after the Act violates Section 628.[206]

**119.** In contrast, commenters in favor of application of the program access provisions to existing contracts argue that Bowen and other cases on retroactivity are inapposite because the statute does not seek to recoup sums previously paid or attach liability for past events.[207] These commenters further argue that the fact that Congress expressly grandfathered in subsection 628(h) a narrow class of existing agreements mandates the conclusion that it intended to include all other contracts within coverage of the Act.[208] They contend that, given the long term nature of many programming agreements, any other interpretation of the applicability of Section 628 would not achieve the results Congress envisioned in a timely fashion.[209] Thus, with respect to the timing of implementation of the rules, some commenters argue that the statutory provisions should become effective immediately,[210] while others suggest that existing contracts be brought into compliance within a reasonable period of time.[211] Others suggest that existing contracts be brought into compliance through the complaint process.[212]

**120.** We affirm our tentative conclusion in the Notice "that any pricing policies or restrictions developed to implement Section 628 should not be applied retroactively to existing contracts."[213] Therefore, consistent with

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203 See, e.g., Liberty Media Reply at 32-34.

204 Id.

205 See, e.g., Group W at 9; UVI at 36.

206 See, e.g., Landmark at 11.

207 See, e.g., NRTC Reply at 19-20.

208 See, e.g., WCA at 29.

209 See, e.g., U.S. West at 5, n. 11.

210 See, e.g., NRTC at 32.

211 See, e.g., APPA Reply at 10.

212 See, e.g., DirecTv at 25-26.

the holdings in Bowen and similar cases that proscribe retroactive application of regulations absent clear congressional intent, the anti-discrimination rules adopted herein will not affect prices paid for past video programming services or penalize vendors for practices preceding passage of the Act. The Commission will, however, apply the rules adopted under Section 628 prospectively to all existing contracts, whether they were executed before or after the effective date of the rules.[214]

**121.** We believe that Congress would not have expressly grandfathered only a narrow class of contracts in Section 628(h) had it intended to generally exempt all existing contracts from the scope of the anti-discrimination requirements of Section 628.[215] Moreover, the long term nature of many programming agreements[216] would delay for several years the uniform implementation of rules intended to prohibit discriminatory practices within the video programming distribution industry.[217] Thus, we believe that Congress intended that rules promulgated to implement Section 628 should be applied prospectively to existing contracts, except as specifically provided for in subsection 628(h).

**122.** Given that renegotiation of existing affiliation agreements will have some disruptive effect on the market and on the entities involved,[218] we believe it is in the public interest to afford parties a reasonable period of time of 120 days after the effective date of the new rules in which to bring their agreements into compliance. After this date, a complainant may base a claim of discrimination on comparisons with contracts that predate passage of the Act, but the point of comparison for determining whether the contract rates offered to the complainant are reasonable should be the current rate paid by its competitor under the original terms of the competitor's contract or, if the contract has been renegotiated, the renegotiated terms.[219] In all cases, the reference point for comparing disparities among contracts must be the terms in effect at the time the complaint is filed rather than those in effect at some other time during the contract.[220]

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213 Notice at 201 (emphasis added).

214 Since this approach does not "alter [] the past legal consequences of past actions" or "change what the law was in the past," it does not constitute retroactive rulemaking. See Bowen, 488 U.S. at 219 (Scalia, J., concurring) (emphasis in original).

215 See, e.g., WCA at 29.

216 See Time Warner at 31-32.

217 See, e.g., U.S. West Reply at 5, n. 11.

218 See, e.g., Liberty Media Reply at 32-34.

219 Cf. Viacom at 34-35.

220 See, e.g., Time Warner Reply at 17 n.10.

## F. Complaint and Enforcement Procedures Regarding Discrimination

**123.** As discussed earlier, we believe that a process derived from our §208 common carrier and §315(b) lowest unit charge complaint processes, modified to limit discovery procedures, will provide the most flexible and expeditious means of enforcing the antidiscrimination provisions of Section 628(c)(2)(B) through the adjudication process. Thus, we will adopt a system that promotes resolution of as many cases as possible on the basis of a complaint, answer and reply. Discovery will not be permitted as a matter of right in all cases, but only as needed on a case-by-case basis, as determined by the staff. Cases that require a relatively contained amount of discovery (limited to written interrogatories and document production) will be resolved at the staff level and shall be subject to review directly to the full Commission. Interlocutory review shall be permitted only after the staff has ruled on the merits. If, however, the staff determines that a case is particularly complex and will require extensive discovery, the parties will be so advised, and will be given the opportunity to resolve the dispute through ADR. If ADR is not selected or is unsuccessful, the case will be designated for an evidentiary hearing before an administrative law judge (ALJ). Interlocutory applications for review in such cases will be similarly limited, and any decision rendered by an ALJ shall be directly appealable to the Commission.

**124.** To minimize the number of complaints brought to the Commission, we will require that prior to filing a discrimination complaint, an aggrieved MVPD must first inform the programming vendor of its belief that discriminatory behavior has occurred. Such notice must be sufficiently detailed so that the vendor can determine the specific nature of the potential complaint. This will give the vendor an opportunity to resolve the dispute without involving the Commission. If the parties cannot reach resolution, the aggrieved MVPD should file its complaint along with evidence (an affidavit or copy of a certified letter) that the required notice to the vendor has been given.[221] Complaints failing to include such evidence will be dismissed. In addition, a one year statute of limitations, as set forth supra, will apply to discrimination complaints.

**125.** Complaint. When filing a complaint, the burden is on the complainant MVPD to make a prima facie showing that there is a difference between the terms, conditions or rates charged (or offered) to the complainant and its competitor by a satellite broadcast programming vendor or a vertically integrated satellite cable programming vendor that meets our attribution test. Thus, if the complaint is brought against a satellite cable programming vendor, the complaint must establish that the vendor meets the attribution standards adopted in this proceeding. In addition, the complainant must establish that it "competes" with the MVPD to which it seeks comparison, either on a national

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[221] At this time, rather than establishing a specific time period for the parties to attempt to resolve the dispute before an aggrieved MVPD may file a complaint, we will allow the aggrieved MVPD to determine the appropriate duration of negotiations. At a minimum, however, the MVPD must provide the potential defendant ten (10) days to respond to the notice, and allow a reasonable time thereafter for negotiations.

or local basis. Thus, the complainant must demonstrate that there is some overlap in actual or proposed service area with the "competing" distributor.

**126.** Next, the complaint must establish that the vendor has provided or offered different terms and conditions, or different prices, to the complainant and its competitor. The complainant may use a "rate card," some other generally available information, or the current contract between the defendant vendor and the complainant's competitor for comparison purposes to demonstrate a differential. If an aggrieved MVPD does not have access to a "rate card" or other comparative rate information (such as the contract with its competitor), it should request, by certified mail, such information from the vendor. If the vendor refuses to provide rate information pertaining to the MVPD's competitor, then the MVPD can file a complaint based on information and belief of an impermissible rate differential, supported by an affidavit,[222] along with a statement that the vendor refused to provide the necessary specific comparative information. The staff will then accept the complainant's rate allegations as true for purposes of its prima facie determination. In this way, we have addressed any concern raised in the comments about the MVPD's lack of access to information without requiring vendors to file "rate cards" or contracts at the Commission, because an aggrieved MVPD will be able to file a complaint and make a prima facie case whether it has access to its competitor's contract or not.

**127.** Answer. The vendor will be given thirty (30) days to file an answer challenging the complainant's allegations or presenting affirmative defenses that the difference in terms and conditions, or the difference between its price to the complainant and its price to the complainant's competitor, is justified by the four factors set forth in the statute for permitted differentials.[223] Alternatively, if the vendor believes that the complainant and the competitor are not sufficiently similar, and thus cannot be realistically compared, it can state its reasons for this conclusion (i.e., the competitor is a "charter" customer under a different rate structure), and submit an alternative contract for comparison with another more similarly situated MVPD that uses the same distribution technology as the competitor selected by the complainant.[224]

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[222] With respect to any adjudicatory process for Section 628, we will require that any supporting affidavit submitted be signed by an officer of the MVPD or vendor that is a party to the complaint.

[223] We note that several commenters argued that 20 days, as proposed in the Notice, was an insufficient period of time for a vendor to prepare a response. See, e.g., TCI at 41, Time Warner at 45. We believe that the thirty days allotted should be sufficient, especially given that vendors will have been given notice of the specific nature of the dispute by the aggrieved MVPD before the complaint is filed, and will thus have the opportunity to begin preparing a defense before the complaint is actually filed.

[224] As discussed earlier, the analysis of whether another MVPD is similarly situated will involve a consideration of geographic region (proximity), number of subscribers, date of entry of contract, type of service

**128.** Even if the defendant vendor chooses to demonstrate that the difference in its price to complainant and to complainant's competitor is justified by the factors set forth in the statute, without relying on an alternative contract providing a comparison to a similarly situated customer, the Commission may still need to reference a contract with a similarly situated customer to determine whether the magnitude of the differential is not discriminatory. For example, if the vendor argues that the price difference between the complainant and its competitor is due to the vendor's standard volume discounts, specific cost differences between the two customers, and certain "offering of service" factors (such as number of services purchased, channel positioning, penetration and marketing incentives), the Commission will have to determine whether each reason offered by the vendor for a differential is allowed under the statutory factors, and whether the precise magnitude of the price difference is justified by those factors.

**129.** The magnitude of a price differential due to standard volume discounts and specific cost differences may be ascertainable without the need to reference any other contract for comparisons. If the vendor submits written documentation that describes any standardized volume discounts routinely used by the vendor, we will accept such evidence in lieu of additional contracts to quantify the magnitude of a permissible differential. Similarly, if the vendor also offers standard discounts for the number of services purchased, channel positioning, penetration, and marketing commitments, then these too can be readily factored into the price calculation without reference to another contract, so long as the vendor submits written documentation that describes such standardized discounts or surcharges. If the vendor does not, however, use standard discounts, the vendor should submit, with its answer, a contract with a similarly situated customer in the same class of service as the complainant's competitor who has negotiated a price based on the same, or as closely similar as possible, terms as the complainant to support the vendor's argument that the price to complainant is fair. The vendor would argue that the price and/or discounts or surcharges given to this similarly situated customer apply to complainant, and therefore demonstrate that the price

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purchased, and specific terms related to distinct attributes of the purchasers or secondary transactions involved in the programming sale itself. For example, a SMATV operator serving portions of Indianapolis files a complaint against Vendor X alleging that the price charged to its cable competitor in Indianapolis is lower. Vendor X responds that it made the contract with the cable operator 10 years ago when it was a fledgling service, so the cable operator got a lower price that is no longer available to <u>any</u> new customers of Vendor X (i.e., such low price is now available neither to SMATV customers <u>nor</u> to cable customers). Moreover, the cable operator has agreed to provide various promotional services that the SMATV operator cannot or will not provide. Vendor X submits a contract that it signed last year with a nearby Bloomington cable operator with a similar number of subscribers as the SMATV operator which also does not include promotional services, arguing that this Bloomington cable operator is "similarly situated" to the Indianapolis SMATV operator, and thus provides the proper comparison.

offered/charged to complainant is not discriminatory.

130. Any contracts or proprietary information submitted by a vendor with its answer may be submitted pursuant to a request for confidentiality.[225] Vendors will not be permitted to redact any information contained in any contracts submitted for comparison purposes, because any terms will arguably affect the ultimate price, as well as the adequacy or appropriateness of the comparison. The complainant will be granted access to any such contracts or proprietary information submitted, provided it agrees to abide by the terms of a protective order that limits access to such information and limits the purposes for which any information obtained through the Section 628 complaint process may be used.[226] The defendant will be given an extra (5) days to submit a second, redacted version of its answer for the public file.

131. Reply. The complainant may file a reply within twenty (20) days after the answer is filed. The reply may challenge the justifications for the price differential relied upon by the vendor or any documentation submitted by the vendor with respect to standardized discounts, or may challenge any alternative comparison the vendor seeks to make as inappropriate because the contract submitted by the vendor is not with a customer who is similarly situated to the complainant. The complainant will have an additional five (5) days to file a second, redacted copy of the reply for the public record if it contains confidential or proprietary information.[227]

132. Staff Determination. After reviewing the complaint, answer and reply, the staff will issue what, for purposes of these proceedings, we will deem a prima facie determination.[228] If the complainant has not shown that there is a differential, or has not met the competitor or attribution standards, or if the vendor has completely justified both the reasons for and the magnitude of the differential to the satisfaction of the reviewing staff, the staff will find that the complainant has not made a prima facie case and will dismiss the complaint with prejudice. In order to dismiss the complaint, however, we emphasize that the staff must be persuaded not only that the vendor's reasons for the differential fall within the scope of the statutory factors as we have interpreted them, but also that the magnitude of the differential is justified.[229]

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225 See 47 C.F.R. § 0.459(a).

226 As in the case of exclusivity complaints, the complainant will be required to take reasonable steps to prevent unauthorized access to protected documents and information. See n. 103, supra.

227 See 47 C.F.R. §0.459(a).

228 Motions to dismiss, motions for summary judgment, or any additional pleadings will not be considered except in extraordinary circumstances or unless requested by the staff. We intend to keep pleadings to a minimum to comply with the statutory directive for an expedited adjudicatory process.

229 For example, a vendor can demonstrate that the magnitude of the

**133.** In an effort to conserve Commission resources and avoid the need for discovery and protracted adjudication aimed solely at resolution of accounting issues, we have determined that it is in the public interest to assign a somewhat higher burden of proof for making a prima facie case on a complainant if the complaint is based on a de minimis price differential. In those cases in which the differential between the complainant's price and that of its competitor is equal to or less than five cents per subscriber or five percent, whichever is larger, we will not require the vendor to justify the magnitude of the differential so long as it provides sufficient reasons that are justified by the statutory factors for a difference in price. Any defendant in a discrimination case relying on this defense must specifically raise it in its answer, stating that the price differential is 5 cents or 5 percent, and identify the statutory factors that it relies on to permit such a differential. We emphasize that this approach does not establish any form of per se zone of reasonableness in pricing, nor does it allow any vendor to automatically charge an MVPD a surcharge of five cents per subscriber or five percent over its competitor. In any discrimination complaint case, the vendor must always demonstrate to the Commission's satisfaction that it has sufficient reasons that are justifiable under the statutory factors to support a de minimis price difference.[230]

**134.** If the staff determines that the complainant has established a prima facie case, and no further information is necessary to determine the fair or reasonable price, the staff will issue an order ruling in favor of the complainant, with appropriate remedies.[231] In most cases, we believe that the appropriate remedy will be to order the vendor to revise its contract or offer to the complainant a price or contract term in accordance with the Commission's findings. However, as discussed previously, the statute provides broad authority to the Commission to order additional remedies or impose sanctions for violations of Section 628, which will be used in appropriate circumstances.

**135.** Discovery. If the staff determines that the complainant has established a prima facie case, and further information is necessary to resolve

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differential is permissible if it has quantified its volume discounts or has applied other quantifiable standard discounts or surcharges, and can show through simple arithmetic that applying these discounts or surcharges results in the price charged or offered to the complainant.

[230] In this way, so long as the vendor provides sufficient reasons to satisfy the reviewing staff that a de minimis price differential is justified, we can conserve Commission resources by not also requiring that the vendor produce and support detailed, precise accounting information.

[231] For example, the staff would issue such an order if it determined, on the basis of the pleadings, that the vendor had improperly applied a particular discount or surcharge, or had relied on a discount or surcharge that was not justifiable under the statutory factors.

the complaint (e.g., additional information is necessary to quantify a permissible differential), the staff will issue a ruling to that effect. The staff will then determine what additional information is necessary, and will develop a discovery process and timetable to resolve the dispute expeditiously. Given the nature of the programming distribution marketplace, and the wide range of sales practices, we do not believe that it would be efficient or advisable to mandate uniform discovery processes herein for Section 628 complaints. Instead, we will provide the staff with flexibility to assess each case and order discovery accordingly. In some cases, we expect that the reviewing staff will itself conduct discovery by issuing appropriate letters of inquiry or require that specific documents be produced. The staff will determine whether it is necessary to file discovery materials with the Commission, or whether they should be provided only to the opposing party. The staff will order that any documents or answers to such inquiries will be submitted to the Commission and to the complainant pursuant to a protective order within a specified time period.

**136.** If the staff cannot readily identify what information is needed, it can direct the parties to submit discovery requests and supporting memoranda within a specified time period. The staff will then schedule a status conference to resolve discovery disputes and establish a timetable for compliance. As in Section 208 common carrier complaint proceedings, the staff will be authorized to issue oral rulings at the status conference which will be confirmed in writing to the parties. Discovery will be limited to issues raised by the vendor's defenses. Any information exchanged through discovery will also be subject to a protective order.

**137.** After the conclusion of discovery, the staff will require the parties to submit briefs, together with proposed findings of fact, conclusions of law and proposed remedies at a specified date. Reply briefs should be filed within the following fifteen (15) days. The parties will be given an additional five (5) days in which to file redacted copies of briefs and reply briefs for the public record when they contain confidential or proprietary information. The staff is expected to act expeditiously. After a ruling on the merits, either party may file an application for review of the staff's determinations directly to the Commission. Such ruling will include a timetable for compliance, and will be effective upon release.[232] In the absence of a stay, any relief or remedy imposed in the order will remain in effect pending review. Stays will not be routinely granted.

**138.** Referral to ALJ. If the staff determines that the complainant has established a prima facie case, and that extensive discovery will probably be required to resolve the complaint, it will so advise the parties in writing. If both parties agree, they may elect to resolve the dispute through ADR. If the parties do not agree to ADR, the staff will designate the complaint for hearing before an ALJ. The ALJs are expected to resolve such cases expeditiously, and should promptly hold a status conference to establish timetables for discovery, hearing (if necessary), and submission of briefs and proposed findings of fact and conclusions of law. A ruling on the merits by

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232 See 47 C.F.R. Section 1.102(b).

the ALJ may be appealed directly to the Commission. Such ruling will be effective upon release.[233] In the absence of a stay, any relief or remedy imposed on the order will remain in effect pending appeal. Stays will not be routinely granted.

G. Complaints Alleging Non-price Discrimination

**139.** Complaint. When filing a complaint, the burden is on the complainant to make a prima facie showing that a satellite broadcast programming vendor or a vertically integrated satellite cable programming vendor that meets the attribution standards outlined herein has engaged in some form of non-price discrimination, such as an unreasonable refusal to sell its programming to the complainant, between the complainant and another MVPD competitor. The complaint must include proof that the complainant has notified the vendor of its potential claim, and must be supported by appropriate documentation or an affidavit setting forth the basis for the claim that the vendor has engaged in a form of non-price discrimination. The complaint should also specify the relief requested. A one-year statute of limitations, as set forth supra, will apply to non-price discrimination complaints.

**140.** Answer and Reply. The vendor will have thirty (30) days in which to respond to the complaint. To avoid a decision in favor of the complainant, the vendor must establish that it has not engaged in discriminatory behavior, such as refusing to sell programming to the complainant for any discriminatory reasons, but that it has not sold its programming to the complainant on the same terms and conditions as the complainant's competitor for legitimate business reasons. For example, a refusal to sell may be based on a legitimate impasse in negotiations. We emphasize, however, that a negotiating impasse will not be regarded as legitimate if it is due to the vendor's adherence to a discriminatory price or condition of sale.[234] The complainant will have twenty (20) days following the answer in which to file a reply.

**141.** Staff Determination. The staff is expected to issue a ruling on the merits expeditiously. Such ruling may be oral or written; any oral ruling will later be released in writing. We do not expect that such cases will present the need for discovery.[235] If appropriate, the staff will order the parties to

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[233] But see 47 C.F.R. Section 1.276(a)(1), in which an initial decision by an administrative law judge does not become effective if appealed until after Commission review. For program access complaint procedures, however, we have determined that the ALJ's decision on the merits should include a timetable for compliance to provide any relief ordered, and we have determined that the order should become effective upon release and remain in effect pending appeal.

[234] If a complaint is based on a refusal to sell that is due strictly to a disagreement in price, however, we will evaluate the complaint under the price discrimination process outlined above using the vendor's offer as the basis for necessary comparisons. We will not permit complainants to use this process for "unreasonable refusals to sell" in addition to, or as a substitute for, the discrimination complaint process.

attempt to negotiate a sale. If the parties cannot resolve their differences within a specified time period, rather than engage in discovery or protracted adjudication, the staff will hold a status conference with the parties to determine whether the failure to reach an agreement is the result of a legitimate negotiating impasse. If, however, the staff determines that the vendor's refusal to sell to complainant on non-discriminatory terms and conditions is unreasonable, it will issue an order with appropriate remedies and sanctions. An application for the review of any staff ruling on the merits may be filed directly by either party to the Commission. Such ruling will include a timetable for compliance and become effective upon release.[236] In the absence of a stay, any relief or remedies imposed in the order will remain in effect pending review. Stays will not be routinely granted.

## VIII. PROHIBITIONS AGAINST UNDUE OR IMPROPER INFLUENCE

### Background

**142.** As indicated above, the Commission is directed to prescribe regulations to specify particular conduct that is prohibited by Section 628(b) in three specific areas. The first of these relates to the exercise of certain types of "undue influence." Specifically, the Commission must:

> establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor.

**143.** In the Notice we sought comment on the scope of activities or practices that we should consider "undue influence." We also asked for comment on standards to apply in distinguishing practices that would constitute undue influence from other actions that may occur during the normal course of negotiations over prices and conditions of programming sales.

### Comments

**144.** Few parties comment on the appropriate definition of undue influence pursuant to this provision. In general, non-cable commenters propose that undue influence should be presumed if particular discriminatory conduct is alleged,[237] while cable commenters assert that the Commission should require

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[235] If, however, discovery is required, the staff may proceed with discovery as allowed in a price discrimination case. Moreover, the staff may designate a case for hearing before an ALJ in particularly complex cases.

[236] See 47 C.F.R. §1.102(b).

[237] See, e.g., DirecTv at 19-20, WJB at 13.

particular proof that undue influence occurred.[238]

Discussion

**145.** Based on information presented in the record, we conclude that the concept of undue influence between affiliated firms is closely linked with discriminatory practices and exclusive contracting, the direct regulation of which is to be undertaken pursuant Sections 628(c)(2)(B), (C), and (D) based on externally ascertainable pricing and contracting information. Section 628(c)(2)(A) can play a supporting role where information is available (such as might come from an internal "whistleblower") that evidences "undue influence" between affiliated firms to initiate or maintain anticompetitive discriminatory pricing, contracting, or product withholding. Although such conduct may be difficult for the Commission or complainants to establish, its regulation provides a useful support for direct discrimination and contracting regulation. A prohibition against such conduct will accordingly be incorporated into the rules.[239]

**146.** Complaint and enforcement procedures. As in the case of both discrimination and exclusivity complaints, we will require that any complainant must first notify the cable operator, vertically integrated satellite cable programming vendor, or satellite broadcast programming vendor of its belief that said party has engaged in prohibited acts or practices. Such notice must provide sufficient specificity so that the cable operator or programming vendor can ascertain the precise nature of the dispute. If the parties cannot resolve the dispute without involving the Commission, the complainant may file a complaint along with evidence (an affidavit or copy of a certified letter) that the required notice has been given.[240] Failure to include such evidence will be grounds for immediate dismissal of the complaint.

**147.** As with all other Section 628 cases, we seek to dispose of as many complaints as possible on the basis of a complaint, answer, and reply.

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[238] See, e.g., Superstar at 42-44, UVI at 21, TCI at 36, Time Warner at 15-17.

[239] We note that the suggestions of the Attorneys General, which are detailed in Appendix C, are either covered by our other regulations regarding discrimination or refusals to deal, or are not within the scope of 628(c)(2)(A) because they do not involve vertical relationships. We also note that APPA provides two examples of conduct that, allegedly, was caused by the undue influence of a vertically integrated cable operator that are more appropriately addressed with reference to the statute's exclusivity provisions. See APPA at 4-6.

[240] At this time, rather than establishing a specific time period for the parties to attempt to resolve the dispute before an aggrieved MVPD may file a complaint, we will allow the aggrieved MVPD to determine the appropriate duration of negotiations. At a minimum, however, the MVPD must provide the potential defendant ten (10) days to respond to the notice, and allow a reasonable time thereafter for negotiations.

Discovery will not be permitted as a matter of right, but on a case-by-case basis as deemed appropriate by the reviewing staff. Interlocutory applications for review shall be permitted only after the staff has issued a ruling on the merits. The ex parte rules regarding restricted proceedings will be applied.

**148.** Complaint. When filing a complaint, the burden of proof will be on the MVPD to establish a prima facie showing that the defendant has engaged in conduct prohibited by Section 628(c)(2)(A). The complainant must show that the defendant is a cable operator, a satellite broadcast programming vendor, or a vertically integrated satellite cable programming vendor that meets the attribution standards established herein. The complaint must be supported by documentary evidence of the alleged violation, or by an affidavit (signed by an officer of the complaining MVPD) setting forth the basis for the complainant's allegations. A one-year statute of limitations, as set forth supra, will apply to undue influence complaints. Finally, the complaint should specify the relief requested.

**149.** Answer and Reply. The defendant will be given thirty (30) days to file an answer responding to the complainant's allegations. The answer should be supported by documentary evidence, or an affidavit (signed by an officer of the defendant), that refutes the complainant's allegations or supports any affirmative defenses the defendant may raise. The complainant will be given twenty (20) days to respond to the defendant's answer.

**150.** Staff Determination. After reviewing the complaint, answer and reply, the staff will make what, for the purposes of these proceedings, we will deem a prima facie determination.[241] If the complainant has not made a prima facie case of a violation the complaint will be dismissed. If the staff determines that the complainant has made a prima facie case of a violation, the staff will so rule, and will determine whether it can grant relief on the basis of the existing record. If the record is not sufficient to resolve the complaint, the staff will determine and outline the appropriate procedures for discovery.

**151.** Discovery. The staff will determine what additional information is necessary to resolve the complaint, and will develop a discovery process and timetable to resolve the dispute expeditiously. Wherever possible, to avoid discovery disputes and arguments pertaining to relevance, the staff will itself conduct discovery by issuing appropriate letters of inquiry or requiring that specific documents be produced. The staff will determine whether the materials ordered to be produced to the opposing party should also be filed with the Commission. The staff will order that any documents or answers to such inquiries will be submitted to the Commission and to the opposing party pursuant to a protective order within a specified time period. If the staff cannot readily determine what information is needed, it can direct the parties to submit discovery requests and supporting memoranda within a specified time period. The staff will then schedule a status conference to resolve discovery

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[241] As in the case of discrimination and exclusivity complaints, motions to dismiss and motions for summary judgment will not be considered. We intend to keep pleadings to a minimum to comply with the statutory directive for an expedited adjudicatory process.

disputes and establish a timetable for compliance.[242] The staff is authorized to issue oral rulings at the status conference which will be confirmed in writing to the parties. Any information exchanged through discovery will be subject to a protective order.

**152.** Upon conclusion of discovery, the staff will direct the parties to submit briefs, together with proposed findings of fact, conclusions of law and proposed remedies on a specified date. Reply briefs should be filed within the following fifteen (15) days. The parties will be given an additional five (5) days in which to file redacted copies of briefs and reply briefs for the public record when they contain confidential or proprietary information from material that is subject to a protective order. After a ruling on the merits, either party may file an application for review of the staff's determinations directly to the Commission. Such ruling will include a timetable for compliance, and will become effective upon release.[243] In the absence of a stay, any relief or remedies imposed therein shall remain in effect pending review. Stays will not be routinely granted.

**153.** Referral to ALJ. If the staff determines that the complainant has established a prima facie case, and that extensive discovery will probably be required to resolve the complaint, it will so advise the parties in writing. If both parties agree, they may elect to resolve the dispute through ADR. If the parties do not agree to ADR, the staff may refer the complaint to an ALJ for an administrative hearing. The ALJs are expected to resolve such cases expeditiously, and should hold an immediate status conference to establish timetables for discovery, hearing, and submission of briefs and proposed findings of fact and conclusions of law. Interlocutory appeals shall be permitted only after a ruling on the merits. A ruling on the merits by the ALJ must be appealed directly to the Commission. Such ruling will include a timetable for compliance and will become effective upon release. In the absence of a stay, any relief or remedies imposed therein will remain in effect pending appeal.

## IX. FRIVOLOUS COMPLAINTS

**154.** As required by Section 628 (f)(3), the Notice made certain proposals with respect to penalties for filing frivolous complaints. Specifically, we proposed to enforce a prohibition against filing frivolous complaints by assessing monetary forfeitures, and sought comment on the relationship between the penalties provided for in the Cable Act and the general penalties contained in Section 503 of the Communications Act as well as comments on guidelines to determine forfeiture amounts. We also requested comment on the factors we

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[242] Additional pleadings, such as responses to opponent's supporting memoranda, beyond those specifically requested by the reviewing staff will not be considered. Parties will have sufficient opportunity to make any necessary additional arguments at any status conference. Again, we intend to keep pleadings to the minimum necessary to resolve the dispute expeditiously.

[243] See 47 C.F.R. §1.102(b).

should consider in determining whether a complaint is frivolous. In response to the Notice's proposals, programming vendors assert that penalties against frivolous complaints are important and suggest that Federal Rule of Civil Procedure 11 be used as a model.[244] They state that a minimum forfeiture should be sufficiently high to discourage frivolous complaints. MVPDs, on the other hand, caution the Commission to "tread lightly" with respect to this issue to avoid deterring legitimate complaints. These parties argue that the complaint should not be deemed frivolous if it is dismissed based on evidence produced by the programmer that the complainant had no way of knowing because such evidence was under the control of the programmer. [245] NRTC argues that no complaint should be found frivolous if there is any difference in price, terms and conditions of service.[246]

**155.** The regulations adopted in this area seek to avoid constraining MVPDs from filing legitimate complaints while affording the statutory protection from frivolous complaints promised to vendors. Although Federal Rule of Civil Procedure 11 offers some useful regulatory language,[247] its provisions are more complex than analogous Commission rules and thus we believe it is not a totally appropriate model. We also reject NRTC's assertion that a complaint is not frivolous if it is based on a difference in price, terms and conditions because this analysis ignores the second part of a prima facie claim, namely that a differential is unjustified. Accordingly, pursuant to Congressional directive, we adopt regulations prohibiting the filing of frivolous complaints alleging violation of any provision of Section 628. Our regulations will also require that all complaints alleging violations of Section 628 must be accompanied by an affidavit signed by an authorized officer or agent of the complainant. To enforce the prohibition against filing frivolous complaints, we will assess monetary forfeitures in accordance with Section 503 of the Communications Act and our forfeiture regulations and policies. For purposes of Section 503(b)(5), one finding that a complainant has filed a frivolous complaint under any provision of Section 628 will be sufficient to fulfill the citation requirements of the forfeiture provisions.

**156.** With respect to the type of complaints that the Commission will deem frivolous, we believe that complaints filed without any effort to ascertain or review the underlying facts should be considered frivolous. We expect that the requirement adopted herein that complaints be accompanied by affidavit should assure that such complaints are based on specific and substantiated facts. When this is not the case, the complainant will be liable for sanctions for violating our rule against frivolous complaints. Similarly,

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244 See, e.g., E! at 11; Liberty Media at 65; Superstar at 67; UVI at 41; and EMI at 13.

245 DirecTv at 31-32.

246 UVI opposed this approach, stating that complaints containing only general and unsupported allegations should be dismissed. See UVI Reply at 5.

247 For example, the requirement of signed affidavit is modeled after a similar requirement in Rule 11.

complainants will be liable for sanctions for filing a frivolous complaint when that complaint is based on arguments that have been specifically rejected by the Commission in other proceedings, or for filing a complaint that has no plausible basis for relief. We agree with DirecTv, however, that a complaint should not be found frivolous if dismissal of the complaint is based solely on evidence that the complainant had no way of knowing before it was produced by the programmer in the complaint process. We expect that further standards with respect to frivolous complaints will develop as specific cases are adjudicated.

## X. ANNUAL REPORT TO CONGRESS

**157.** Section 628(g) of the 1992 Cable Act directs the Commission to annually report to Congress on the status of competition in the video programming marketplace. The Commission must issue its first report within 18 months of promulgating program access regulations. In the Notice, we proposed that the report should include, at a minimum, an analysis of Section 628 complaints filed with the Commission, as well as generally available industry information regarding the status of competition in the satellite cable and satellite broadcast programming marketplace.[248] We also sought comment on additional information to be collected, including data regarding (1) the number of independently owned cable operators and programming distributors; (2) the degree of vertical integration between cable operators and programming distributors; (3) the penetration or availability of programming to competing multichannel services; and (4) the levels of pricing differentials for programming, including the range and average of volume-related discounts and other permissible differentials.[249] Of the very few commenters that address the content of our annual reports, some argue that we should require an annual submission from cable programmers detailing specific pricing data and include this information in our report to Congress. Other commenters, however, are concerned that submission of specific price data would be detrimental to competition.

**158.** We intend to include in our annual report to Congress the type of information specified in categories (1), (2) and (3) above. Such data will be readily available through existing industry publications and through data submitted during the complaint process, and we therefore do not intend to impose reporting requirements on programmers or distributors. We believe that annual analysis of this information will enable us to closely follow the competitive development of the video programming industry. While data of the type specified in category (4) would also be informative, we are concerned that

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[248] The Notice also sought comment on a process for collecting data necessary to facilitate our resolution of programming access complaints, as directed by Section 628(f)(2). We note that our decisions regarding the enforcement processes for alleged instances of discrimination, exclusivity, and unfair practices, will address the types of information that we will require to resolve complaints, and how to maintain the confidentiality of proprietary information.

[249] Notice at 205.

disclosure of such data, even in aggregate form, could hinder competition in the industry. We will, however, summarize our experience with the complaint process in our reports to Congress, and we will include the total number of complaints resolved and will report on the general nature of those complaints. Thus, our reports to Congress will also include public or non-protected information from the complaints, as well as a general summary of data without divulging proprietary information. In addition, although we have not adopted a specific program access reporting requirement, we may subsequently request program access information as part of a general collection of information commenced with respect to other requirements of the 1992 Cable Act.

## XI. CONCLUSION

**159.** In this Report and Order, we adopt rules to implement the new Section 628 of the Communications Act regarding program access. After evaluating the record in this proceeding, we are cognizant that even as distributors gain access to programming services, their ability to enhance the diversity of programming available to the public will still depend upon their opportunities to purchase programming at nondiscriminatory prices and terms. We also recognize testimony in the legislative history of the 1992 Cable Act that caused Congress to conclude that vertically integrated program suppliers have the incentive and ability to discriminate and favor their affiliated cable operators over other multichannel programming distributors. Therefore, we seek to adopt implementing rules for Section 628 that will prohibit and remedy such problems, thus fulfilling the congressional intent to prohibit unfair or anticompetitive actions without restraining the amount of multichannel programming available by precluding legitimate business practices that enhance competition and create programming diversity. Finally, in response to the Congressional mandate to develop an adjudicatory process for implementing the provisions of Section 628, we establish procedures tailored to specific classes of complaints in order to resolve such matters as expeditiously as possible.

## XII. ADMINISTRATIVE MATTERS

### A. Final Regulatory Flexibility Analysis

**160.** The Final Regulatory Flexibility Analysis is attached as Appendix D.

### B. Paperwork Reduction Act Statement

**161.** The decision in this proceeding has been analyzed with respect to the Paperwork Reduction Act of 1980, and has been found to impose new or modified requirements or burdens upon the public. Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

### C. Ordering Clauses

**162.** Accordingly, IT IS ORDERED that, pursuant to Sections 2(a), 4(i), and

303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152(a), 154(i), and 303(r), Part 76 of the Commission's Rules, 47 C.F.R. Part 76, IS AMENDED as set forth in Appendix E, below, effective July 16, 1993.

**163.** IT IS FURTHER ORDERED that MM Docket No. 92-265 will remain open until such time as the remaining issues relating to Section 12 of the Cable Act are resolved.

**164.** For further information in this proceeding, contact James Coltharp, Mass Media Bureau, (202) 632-6302; Diane Hofbauer, Office of the General Counsel, (202) 632-6990; Jane Halprin, Mass Media Bureau, (202) 632-7792; or Rosalee Chiara, Common Carrier Bureau, (202) 634-1781.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

## APPENDIX A: Section 19 of the 1992 Cable Act

SEC. 19. DEVELOPMENT OF COMPETITION AND DIVERSITY IN VIDEO PROGRAMMING DISTRIBUTION.

Part III of title VI of the Communications Act of 1934 is amended by inserting after section 627 (47 U.S.C. 547) the following new section:

"SEC. 628. DEVELOPMENT OF COMPETITION AND DIVERSITY IN VIDEO PROGRAMMING DISTRIBUTION.

"(a) Purpose.--The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.

"(b) Prohibition.--It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

"(c) Regulations Required.--

"(1) Proceeding required.--Within 180 days after the date of enactment of this section, the Commission shall, in order to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technologies, prescribe regulations to specify particular conduct that is prohibited by subsection (b).

"(2) Minimum contents of regulations.--The regulations to be promulgated under this section shall--

"(A) establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor;

"(B) prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups; except that such a satellite cable programming vendor in which a cable operator has an attributable interest or such a satellite broadcast programming vendor shall not be prohibited from--

"(i) imposing reasonable requirements for creditworthiness,

offering of service, and financial stability and standards regarding character and technical quality;

"(ii) establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming;

"(iii) establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor; or

"(iv) entering into an exclusive contract that is permitted under subparagraph (D);

"(C) prohibit practices, understandings, arrangements, and activities, including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or satellite broadcast programming vendor, that prevent a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of the date of enactment of this section; and

"(D) with respect to distribution to persons in areas served by a cable operator, prohibit exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, unless the Commission determines (in accordance with paragraph (4)) that such contract is in the public interest.

"(3) Limitations.--

"(A) Geographic limitations.--Nothing in this section shall require any person who is engaged in the national or regional distribution of video programming to make such programming available in any geographic area beyond which such programming has been authorized or licensed for distribution.

"(B) Applicability to satellite retransmissions.--Nothing in this section shall apply (i) to the signal of any broadcast affiliate of a national television network or other television signal that is retransmitted by satellite but that is not satellite broadcast programming, or (ii) to any internal satellite communication of any broadcast network or cable network that is not satellite broadcast programming.

"(4) Public interest determinations on exclusive contracts.--In determining whether an exclusive contract is in the public interest for purposes of paragraph (2)(D), the Commission shall consider each of the following factors with respect to the effect of such contract on the distribution of video programming in areas that are served by a cable operator:

"(A) the effect of such exclusive contract on the development of

competition in local and national multichannel video programming distribution markets;

"(B) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable;

"(C) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming;

"(D) the effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and

"(E) the duration of the exclusive contract.

"(5) Sunset provision.--The prohibition required by paragraph (2)(D) shall cease to be effective 10 years after the date of enactment of this section, unless the Commission finds, in a proceeding conducted during the last year of such 10-year period, that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.

"(d) Adjudicatory Proceeding.--Any multichannel video programming distributor aggrieved by conduct that it alleges constitutes a violation of subsection (b), or the regulations of the Commission under subsection (c), may commence an adjudicatory proceeding at the Commission.

"(e) Remedies for Violations.--

"(1) Remedies authorized.--Upon completion of such adjudicatory proceeding, the Commission shall have the power to order appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor.

"(2) Additional remedies.--The remedies provided in paragraph (1) are in addition to and not in lieu of the remedies available under title V or any other provision of this Act.

"(f) Procedures.--The Commission shall prescribe regulations to implement this section. The Commission's regulations shall--

"(1) provide for an expedited review of any complaints made pursuant to this section;

"(2) establish procedures for the Commission to collect such data, including the right to obtain copies of all contracts and documents reflecting arrangements and understandings alleged to violate this section, as the Commission requires to carry out this section; and

"(3) provide for penalties to be assessed against any person filing a frivolous complaint pursuant to this section.

"(g) Reports.--The Commission shall, beginning not later than 18 months after promulgation of the regulations required by subsection (c), annually report to Congress on the status of competition in the market for the delivery of video programming.

"(h) Exemptions for Prior Contracts.--

"(1) In general.--Nothing in this section shall affect any contract that grants exclusive distribution rights to any person with respect to satellite cable programming and that was entered into on or before June 1, 1990, except that the provisions of subsection (c)(2)(C) shall apply for distribution to persons in areas not served by a cable operator.

"(2) Limitation on renewals.--A contract that was entered into on or